IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980
No. 80-1092

Jimmy Eaton and Evans Benton ..... *Petitioners*

V.

Supreme Court of Arkansas Committee
on Professional Conduct ..... *Respondent*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION

PHILIP E. DIXON*
TERRY C. PAULSON
HOUSE, HOLMES & JEWELL, P.A.
1550 Tower Building
Little Rock, Arkansas 72201
(501) 375-9151

Counsel for Respondent

**Counsel of Record*

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STATEMENT OF THE CASE

Petitioners are two attorneys, and members of the practicing Bar of the State of Arkansas, who practice in North Little Rock, Arkansas, as partners in the firm of Eaton and Benton. Respondent is the Committee duly established by the Arkansas Supreme Court under authority of the Twenty-eighth Amendment of the Arkansas Constitution [1] which is charged with the regulation of the practice of law

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[1] "Supreme Court—Rule Making Power. —The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law."

and the professional conduct of attorneys in the State of Arkansas.

In March, 1974, Petitioners initiated a program to advertise their law firm which utilized a "direct mail" technique provided by Val-Pak, an advertising company. The target market was 10,000 residences in North Little Rock, Arkansas. Other advertisers in the same mailing as that of Petitioners included, among others, several "fast food" establishments, local realtors, and various local retail stores, and some of the other advertisers offered discounts on merchandise or giveaways of one type or another.

Respondent Committee received a complaint about Petitioners' ad and the proper grievance procedure was begun. Petitioners ultimately received a private reprimand which was upheld after appeals to the full Committee and the Arkansas Supreme Court.

The Arkansas Supreme Court found that Respondent had committed no violation of the First Amendment to the United States Constitution while noting that this Court has approved reasonable time, place and manner restrictions on lawyer advertising.

ARGUMENT
In Opposition to Granting the Writ

I.

THE COURT BELOW CONSIDERED AND DISTINGUISHED DECISIONS OF OTHER STATE COURTS OF LAST RESORT DEALING WITH ATTORNEY ADVERTISING THUS RESOLVING ANY APPARENT CONFLICT.

Petitioners rely heavily upon the decision of the Kentucky Supreme Court in *Kentucky Bar Association v. Stuart*, 568 S.W.2d 933 (Ky. 1978) and of the New York Court of Appeals in *In re Koffler*, 49 U.S.L.W. 2290 (N.Y. Ct. App. 10/21/80), claiming that the Arkansas Supreme Court's decision below was in direct conflict therewith. What Petitioners failed to note, however, is that the court below carefully considered these decisions and their persuasive value to the instant case.

The two attorneys charged with unprofessional and unethical conduct in *Kentucky Bar Association v. Stuart*, *supra*, mailed letters containing specific prices for specific services to two real estate agencies. This activity was initially deemed to be "in-person solicitation" which violated the Association's Disciplinary Rules, but the Kentucky Supreme Court found that the letters presented neither deceptive statements nor overreaching language. The court stated:

> In short the Association has failed to demonstrate a sufficient justification for prohibition of advertising by letter.

Kentucky Bar Association v. Stuart, 568 S.W.2d 933, 934 (Ky. 1978). The Kentucky Court addressed only the manner of dissemination in *Stuart:* the mailing of *letters.* Thus, the *Stuart* case is distinguishable on its facts alone: the ad-letters were directed to a known and limited market, sophisticated in its knowledge of the ins and outs of the legal aspects of real estate transactions; and the ad-letters contained a specific list of legal services which were limited to the legal aspects of real estate transactions and for which specific fees were provided. Petitioners' ad could boast of neither a sophisticated target market nor specific contents. (See Petition for Writ of Certiorari at 7). The Arkansas Supreme Court noted this discrepancy between the instant case and the *Stuart* case when it held:

> Here we find that a *combination of the content and manner of dissemination* in this case constitutes a violation of our rules.

(Pet. App. A at 21) (emphasis added). Neither content nor manner of dissemination alone would suffice to commit a clear violation of the Arkansas Code of Professional Responsibility, but the combination of the two was fatal.

The most recent appeal of *In re Koffler*, 49 U.S.L.W. 2290 (N.Y. Ct. App. 10/21/80) is distinguishable from the instant case as well as the *Stuart* case. A summary of the facts of *Koffler* appears in the decision below at 420 N.Y.S.2d 560 (1979). Again, a letter advertisement was involved, and specific fees for specific legal services performed in regard to real estate transactions were at issue. The New York Court of Appeals, in overturning the decision of the New York Supreme Court, recognized that the objectives to be achieved by restricting lawyer advertising are legitimate and important state interests. In keeping with the United States Supreme Court

"commercial free speech" cases, however, the court found that the interest sought to be suppressed—the "free dissemination of truthful price information"—outweighed the state's interest in lawyer advertising. 49 U.S.L.W. 2290 (10/21/80).

This protected interest of making price information known was carefully considered by the Arkansas Supreme Court and was found to be lacking in Petitioners' ad. The court stated:

> Furthermore, it [Petitioners' ad] was in violation of the rule requiring such advertisements to be informative in nature . . . . Its primary purpose was not to inform the consumer to facilitate an informed choice by allowing fee comparison, but rather to urge a group of specific potential consumers to seek petitioners' services . . . .

(Pet. App. A at 19-20). Therefore, there is no true First Amendment right at hand to be protected.

Respondent believes it worthy of note that, in fact, the court below did not render an opinion in conflict with *In re Koffler;* The New York Court of Appeals rendered an opinion inconsistent with *In re Eaton and Benton.* The Arkansas Supreme Court issued its opinion on October 6, 1980, while the New York Court of Appeals' decision was not handed down until October 21, 1980.

Another factor which further distinguishes the *Koffler* case is the existence of a separate bar rule in New York which specifically deals with "direct mail advertisements." *See In re Koffler,* 49 U.S.L.W. at 2290. In considering this factor, an obvious problem rears its head which Petitioners did not address: although the state court

decisions appear to be conflicting, do they remain truly at odds when all applicable state disciplinary rules and codes claimed to have been violated are compared? That the conflict remains appears highly unlikely.

II.

THE OPINION BELOW CLOSELY ACCORDS WITH THE APPLICABLE DECISIONS OF THIS COURT.

The Arkansas Supreme Court closely analyzed *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). See Pet. App. A at 14-23. The court found the Petitioners' ad to be sufficiently dissimilar to that in *Bates* as to be subject to reasonable time, place and manner restrictions. Pet. App. A at 20. The prime consideration in *Bates* was whether attorneys should be permitted to advertise *prices*, and if so, whether all prices or only those prices for certain routine legal services. In holding that attorneys may indeed advertise prices for routine services, this Court intended that the making of an informed selection of attorneys be facilitated for the public. 433 U.S. at 375. This same intention guided the Arkansas Supreme Court when it held:

> The advertisement here did not meet the stated purpose of advertising legal services, in that there was no indication to the consumer how these petitioners were competitive other than their initial consultation fee.

Pet. App. A at 20. Thus, it is evident that the decision below follows, rather than conflicts, with this Court's opinion in *Bates*.

The court below did indeed consider whether the advertising at issue fell within the parameters of

commercial speech protected by the First Amendment. Perhaps it did not make its meaning crystal clear when it held that lawyer advertising in Arkansas will be subject to time, place, and manner restrictions as set out in *Bates*. Pet. App. A at 23. However, the quote from this Court's opinion in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) which followed the Arkansas court's finding should have made the Arkansas position more certain:

> A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation . . . . *While entitled to some constitutional protection, appellant's conduct is subject to regulation* in furtherance of important state interests.

436 U.S. at 459 (emphasis added). Further, the court's own statement which followed should have laid to rest any doubt whether the court had considered the First Amendment ramifications of its decision:

> [T]his court was well aware of federal and state constitutional requirements when it adopted the disciplinary rules.
>
> Pet. App. at 23.

The decision below also contained an analysis and application of *In re Primus*, 436 U.S. 412 (1978) in regard to First Amendment protection. The court adopted this Court's position in *Primus* that a state has a special interest in regulating the actions of persons who serve as officers of its courts, and that interest gives rise to the authority to draw narrow rules proscribing solicitation and limiting attorney advertising. *Id. See also In re Primus*, 436 U.S. 412, 438 (1978).

From the above, and from a close reading of the opinion below, the depth of First Amendment analysis performed by the court below becomes evident. While not having done so in the precise manner suggested by the four-pronged test in *Central Hudson Gas and Electric Corporation v. Public Service Coimmission*, 48 U.S.L.W. 4783 (June 20, 1980), the court below performed the analysis and weighing which the *Central Hudson* test provides.

III.

THE QUESTION PRESENTED BY PETITIONERS IS A STATE MATTER RATHER THAN A FEDERAL MATTER.

Granted, this case is among the first to offer to test the extent of *Bates*. Respondent submits, however, that the case is far from being adequately "ripe".

As Petitioners pointed out in their argument, there are at least two, if not countless, variations of the Disciplinary Rule at issue. Pet. App. A at 11. Until such time as all, or a large majority, of the states adopt the same rule, a decision in this case would advance no national uniformity or clarify the confines of attorney advertising. The Arkansas Court meticulously followed the extant guidelines established by this Court in rendering its decision. The decision below needs no further clarification at this time.

As noted above, the Arkansas Constitution, Amendment Twenty-eight, grants to the Arkansas Supreme Court the power and duty to regulate the practice of law in Arkansas. The Arkansas court has indeed addressed the issue of advertising, and has taken a stand. This is not a proper case for federal pre-emption.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

PHILIP E. DIXON*
TERRY C. PAULSON
HOUSE, HOLMES & JEWELL, P.A.
1550 Tower Building
Little Rock, Arkansas 72201
(501) 375-9151

Counsel for Respondent

**Counsel of Record*

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have personally served three (3) copies of this Brief in Opposition to Petition for Writ of Certiorari upon counsel for Petitioners Jimmy Eaton and Evans Benton, ROBERT JOSEPH BROWN, P. O. Box 3773, Little Rock, Arkansas 72201.

I further certify that all parties required to be served have been served.

/s/ Philip E. Dixon
PHILIP E. DIXON
HOUSE, HOLMES & JEWELL, P.A.
1550 Tower Building
Little Rock, Arkansas 72201

Counsel for Respondent